

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 19, 2007

ANGELIA LAVERNE KIENLEN v. RICHARD LAIRD KIENLEN

Appeal from the Circuit Court for Bradley County
No. V-05-695 Jerri S. Bryant, Chancellor

No. E2007-00067-COA-R3-CV - FILED JULY 11, 2007

The trial court granted Angelia Laverne Kienlen (“Wife”) a divorce from Richard Laird Kienlen (“Husband”). The court ordered Husband to pay monthly child support of \$901 and alimony *in futuro* of \$150 per month. Husband appeals, contending that the court erred in awarding Wife spousal support.¹ We modify the award of alimony. As modified, the trial court’s judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

B. Prince Miller, Jr., Cleveland, Tennessee, for the appellant, Richard Laird Kienlen.

Angelia Laverne Kienlen, appellee, pro se.

OPINION

I.

The lower court’s judgment dissolved a marriage of some 16 years.² At the time of the divorce, the parties had one minor child – a daughter who was then a few months shy of her seventeenth birthday. The court’s award of monthly child support to Wife is not at issue on this appeal.

¹Wife did not raise new issues on appeal.

²Before the marriage dissolved in this case, the parties were married to each other from 1984 to 1989. The parties remarried in 1990.

Husband is 45 years old. He is employed as the Director of the Bradley County Misdemeanor Probation Program. He earns a gross annual salary of \$42,600 and has accumulated approximately \$4,711 in a 401(k) account. Husband is a member of the Tennessee Consolidated Retirement System (“the TCRS”). He has employer-provided health insurance coverage at no cost to him. Husband, who has a college degree, also works part-time as an umpire and referee for the YMCA and other local sports leagues, work for which he is compensated.

Wife, who is 46, works as a deputy clerk in the office of the Clerk of the Bradley County General Sessions Court. She has held this position since the fall of 2000. Her gross annual income is \$18,000. She is also a member of the TCRS. During earlier employment as an executive secretary at the Church of God Headquarters, Wife’s income was the sole support of the family for a year or so while Husband finished his college degree work.

II.

Husband stipulated, pursuant to T.C.A. § 36-4-129(a), that Wife had grounds for divorce. Following a bench trial with respect to the remaining issues, the court entered a judgment awarding Wife a divorce from Husband on the ground of inappropriate marital conduct. The court gave Wife the marital residence, her automobile, the value of her 401(k) account, and various items of personal property. In addition to the mortgage loan on the marital residence, Wife was ordered to pay several of the parties’ marital debts, including numerous credit card balances. Husband was awarded his automobile, a moped, his 401(k) account, and a few items of personal property. The court ordered Husband to pay a MasterCard balance of \$9,500, a home equity loan that he had initiated, and a Citgo credit card balance. The court also addressed the issues of child support and spousal support. The court ordered Husband to pay Wife, in her role as the primary residential parent of the parties’ minor daughter, the sum of \$901 per month as child support. Reasoning that Wife was in need of alimony *in futuro*, the court burdened Husband with a spousal support *in futuro* obligation of \$150 per month.

III.

Husband raises the following issue as taken verbatim from his brief:

Appellant appeals the award of alimony *in futuro* assessed against him by the trial court and requests the Court of Appeals to modify the Decree and deny the award of alimony *in futuro*.

IV.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court’s factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review

of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

A trial court has broad discretion in determining whether to award spousal support. See ***Bratton v. Bratton***, 136 S.W.3d 595, 605 (Tenn. 2004). Our role in reviewing a trial court's decision regarding alimony is "to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." ***Broadbent v. Broadbent***, 211 S.W.3d 216, 220 (Tenn. 2006). We review the trial court's decision under an abuse of discretion standard. ***Id.***

V.

Husband's principal argument with respect to the alimony award is that he lacks the ability to pay it. In addition, he asserts that he should not be required to pay alimony because, according to him, Wife has the ability to earn more money than she is currently earning. See T.C.A. § 36-5-121(i)(1), (2) (2005). With respect to this latter assertion, Husband stresses the fact that Wife, at one point in time, was earning approximately \$21,000 a year as a bookkeeper.

There are no hard and fast rules governing spousal support decisions. ***Anderton v. Anderton***, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). Such decisions require a careful balancing

of the statutory factors set forth in T.C.A. § 36-5-121(i)³ and depend upon the unique facts of each case. *Anderton*, 988 S.W.2d at 683 (citing the predecessor to T.C.A. § 36-5-121(i)). While each relevant factor contained in T.C.A. § 36-5-121(i) must be considered, the two most important factors are the obligee spouse's need and the obligor spouse's ability to pay. *Anderton*, 988 S.W.2d at 683.

The parties' second marriage lasted approximately 16 years. *See* T.C.A. § 36-5-121(i)(3). Husband's admitted adultery played a part in the demise of this union. *See id.* at (i)(11). Husband and Wife are in their mid-40s and both have college degrees. *See id.* at (i)(2), (4). Each party has made monetary contributions to the marriage. *See id.* at (i)(10). Wife earns \$18,000 a year working in the General Sessions Court Clerk's office. *See id.* at (i)(1). Husband earns \$42,600 annually as

³ T.C.A. § 36-5-121(i) sets forth the factors for a trial court to consider in determining whether alimony is appropriate, and if so, the nature, amount, length of term, and manner of payment:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

the Director of the county's Probation Program. *See id.* He also earns additional income working as a part-time umpire and referee. *See id.* Wife may possess the ability to earn a higher salary than she is currently earning; however, as the trial court noted, Wife's current position is "acceptable." She has been employed in that position for several years. The position provides free health insurance coverage, a retirement account, and annual/sick leave. Wife has also contributed to the marriage in her role as homemaker. *See id.* at (i)(10). Her job with the county has allowed her to take an active role in the raising of the parties' two children. *See id.*

Wife filed an Income and Expense Statement indicating that her net monthly income is \$1,391.34 and that her total projected monthly expenses are \$4,273.95. Wife also filed a more detailed document which evidences her *actual* income and expenses for the months of August 2005 through May 2006. The actual monthly expenses were significantly less than the amount of anticipated monthly expenses shown in Wife's Income and Expense Statement. The trial court found that Wife needed \$1,500 a month above and beyond (a) her income and (b) the \$901 she receives as child support for the parties' daughter. In effect, this means that the court found that Wife had a total monthly need of approximately \$3,790. Though the record – particularly the document evidencing Wife's actual monthly expenses – preponderates against the trial court's finding that Wife needs a total of \$3,790 per month, it does support the court's implicit finding that Wife is at an economic disadvantage vis-a-vis Husband and in need of alimony *in futuro*. *See Anderton*, 988 S.W.2d at 683.

Husband's Income and Expense Statement shows that he has a net monthly income of \$2,952.96 and total monthly expenses of \$2,374.50. The trial court eliminated certain items from the expenses listed in Husband's Income and Expense Statement and found that his total monthly expenses, not including his child support obligation, amounted to \$2,174. The evidence does not preponderate against this finding. Husband had a projected excess of \$778 per month *before* child support and spousal support were considered. He had a monthly deficit of \$123 after deduction of his \$901 monthly child support obligation. The evidence shows that there were no available funds for alimony. The evidence preponderates against a finding that Husband has the financial resources to make alimony payments *while he is paying his child support obligation*. Under these facts, we find that the trial court abused its discretion when it directed Husband to begin paying Wife \$150 a month as alimony *in futuro* during the period of the minority of the parties' child.

Our finding that the trial court erred in awarding alimony to Wife when Husband has no current ability to pay such alimony does not end the discussion in this case. The parties' minor daughter will reach the age of majority in September 2007. At the time of the trial in this case, June 2006, the daughter was about to start her senior year in high school. Thus, the class of which she was a member graduated from high school in the spring of 2007. At the time of the graduation, the child was still shy of her eighteenth birthday. Given these facts, Husband's support obligation for

the parties' daughter will expire when she turns 18 in September 2007. *See* T.C.A. § 34-1-102(b)(2001).⁴ Following the termination of his child support obligation, Husband will have excess funds to pay the amount of spousal support found to be appropriate by the trial court. Considering the two most critical factors in making an award of alimony – the “real need” of the spouse and the ability of the obligor spouse to pay – we find that it is appropriate to require Husband to pay Wife alimony *in futuro* when his child support obligation expires.

As previously noted, Husband's child support obligation of \$901 per month will shortly terminate. When this occurs, Husband will have the ability to pay the court-ordered spousal support of \$150 per month. The evidence clearly preponderates that Wife will continue to have a need for alimony *in futuro* after their daughter has reached the age of majority. This need is a result of the demise of this marriage. As we have pointed out earlier in this opinion, this marriage came to an end in large measure due to the misconduct of Husband. *See* T.C.A. § 36-5-121(i)(11).

Based upon the foregoing, we hold that, effective beginning the first month following the month in which Husband's child support obligation terminates, Husband will pay Wife, in advance, \$150 a month as alimony *in futuro*.

To the extent that Husband has paid Wife alimony of \$150 per month during the minority of the child, said payments will serve as a credit against his alimony obligation going forward.

VI.

The trial court's judgment ordering Husband to begin paying Wife \$150 as alimony *in futuro* is hereby modified. Due to his limited financial resources, Husband is not able to pay alimony during the period in which he is paying child support for the parties' daughter. However, upon the termination of his child support obligation, Husband will pay Wife \$150 a month as alimony *in futuro*, said obligation to terminate upon Wife's remarriage or death. This case is remanded to the trial court for the enforcement of that court's judgment, as modified, and for the collection of costs assessed below. Exercising our discretion, we tax the costs on appeal one-half to the appellant, Richard Laird Kienlen, and one-half to the appellee, Angelia Laverne Kienlen.

CHARLES D. SUSANO, JR., JUDGE

⁴ T.C.A. § 34-1-102(b) provides that

[p]arents shall continue to be responsible for the support of each child for whom they are responsible after the child reaches eighteen (18) years of age if the child is in high school. The duty of support shall continue until the child graduates from high school or the class of which the child is a member when the child attains eighteen (18) years of age graduates, whichever occurs first.